REPEAL OF THE JUDICIARY ACT OF 1801

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The intent of the framers of the judiciary act of 1801 has been to the present day a matter of some doubt. On the one hand it has been shown that alterations in the judiciary system of the United States had long been agitated before the failure of the Federalist party in the elections of 1800.[1] Soon after the establishment of federal courts in 1789 relief had been sought by the justices of the supreme court from the arduous duties necessitated in riding the circuits.[2] In 1799 a bill designed to establish a system of circuit courts was reported upon which action was postponed. But this later became the basis for the act of 1801.[3] It has, therefore, been contended that, quite apart from the political advantage given the Federalists by the passage of the act of 1801, such changes in the judiciary system were warranted by necessity.

At the same time it is equally clear that the amount of business before the courts of the United States, although it had been excessive, had begun to decline. No further prosecutions were to be expected under the alien and sedition acts, and a decrease in the number of suits before the federal courts involving other questions was observed even before the accession of Jefferson to the presidency.[4] Although the expense involved in the creation of the sixteen additional judgeships was grossly overestimated at the time,[5] it cannot be doubted that the Republi-

[1] See Farrand: *American Historical Review*, v, p. 682.

[2] *American State Papers*, Misc. i, pp. 51–52.

[3] *Annals 7th Cong.*, 1st Sess., p. 672.

[4] *American State Papers*, Misc. i, p. 319 et seq.

[5] In the debates on the repeal of the act of 1801 the Republicans claimed the expense of the new courts to be $137,000. Professor Farrand estimates the expense at not more than $50,000. *American Historical Review*, v. p. 685.

cans with their avowed policy of retrenchment had solid ground for feeling that these changes in the judiciary burdened the nation with an unnecessary expenditure.[6]

But what aroused the bitterest hostility among the Republicans was the partisan character of the appointments made by President Adams to the newly created offices. Nominated and confirmed during the last hours of his administration, every officer was a staunch Federalist and thoroughly wanting in sympathy with the new party which was so soon to come into power. A constitutional prohibition prevented the President from rewarding his friends in Congress with places upon the new circuit courts.[7] But places were found for Richard Bassett who as a presidential elector in 1797 had voted for Adams, and for Jeremiah Smith who had distinguished himself during the two administrations of Washington by his unwavering loyalty in the support of all Federalist measures before Congress. Charles Lee, Adams' attorney general, and Oliver Wolcott, who succeeded Hamilton as secretary of the treasury and won the undying enmity of the Republicans by his conduct of that office, were similarly rewarded. Jared Ingersoll and Philip Barton Key, ardent Federalist partisans, were also commissioned.[8]

Other appointments to the circuit courts were for the most part made by promotion from the district courts. To the vacancies created in these courts President Adams followed the same policy of appointing loyal Federalists. Elijah Paine and Ray Greene, members of the United States Senate, and William H. Hill and Jacob Read, members of the House of Representatives, left Congress to receive places on the district courts. Harrison Gray Otis and John Wilkes Kittera, able advocates of Federalist policies in the House of Representatives, departed at the same time, carrying with them commissions to United States district attorneyships.[9] It is not surprising, therefore, that factional feeling among the Republicans ran high and severe criticism was meted out to the courts.

[6] *Annals 7th Cong.*, 1st Sess., p. 26.
[7] Art. I, Sect. 4.
[8] *Executive Journal* (1789–1805), pp. 381, 383.
[9] Ibid., pp. 384–385.

But whether the "act to provide for the more convenient organization of the courts of the United States" was the result of a partisan attempt of the Federalists to retain a hold on the national government after they had been defeated in the elections of 1800 may or may not be true. The fact is that by a large group the changes were believed to be of this character. A letter of Stevens Thomson Mason, a close friend of Thomas Jefferson, declares that "a new judiciary system has been adopted with a view to make permanent provision for such of the Federalists and Tories as cannot hope to continue in office under the new administration."[10]

This is, of course, partisan comment on possibly partisan action. Nevertheless there was a general expectation that the new administration would make some changes in the judiciary. The nature of these changes was not early determined and no idea was held that extensive alteration would be possible. On March 16, 1801, William B. Giles wrote Jefferson that "a pretty general purgation of office has been one of the benefits expected by the friends of the new order of things, and although an indiscriminate privation of office, merely from a difference in political sentiment, might not be expected; yet it is expected, and confidently expected, the obnoxious men will be ousted. It appears to me that the only check upon the judiciary system as it is now organized and filled, is the removal of all its executive officers indiscriminately. The judges have been the most unblushing violators of the constitutional restrictions and their officers have been the humble echoes of all their vicious schemes."[11]

At the establishment of the national government Jefferson had insisted upon the necessity of a strong judiciary. "Let the judiciary," he urged, "be rendered respectable;" and he advocated firm tenure and competent salaries for the judges.[12] But when

[10] Breckinridge MSS., Feb. (19), 1801. The collection of the Breckinridge family papers in the Library of Congress has not yet been opened to the public. I am indebted to Miss Sophonisba Breckinridge for permission to make use of these unusually valuable manuscripts.

[11] Jefferson MSS., March 16, 1801.

[12] Letter to Barry, December 21, 1791.

the courts began the enforcement of the sedition act his attitude changed to one of hostility. After the conviction of Matthew Lyon for violation of that measure he wrote: "I know not which mortifies me most, that I should have to write what I think, or that my country bear such a state of things. Yet Lyon's judges and a jury of all nations are objects of rational fear."[13] But in spite of his indignant protests at the judicial decisions interpreting the obnoxious Federalist legislation, Jefferson at the time he became President, had no thought of assailing the courts themselves. He agreed that no further encroachment upon the judicial power than that suggested by Giles was possible, and replied that "the courts being so decidedly federal and irremovable, it is believed that republican attorneys and marshals, being the doors of entrance into the courts, are indispensably necessary as a shield to the republican part of our fellow citizens, which, I believe is the main body of our people."[14]

By June of the same year far more radical plans had developed. From one extreme the Republicans rushed to the other and the actual invasion of the judicial power was advocated. In a letter of June 1, 1801 Giles said: "It appears to me that no remedy is competent to redress the evil but an absolute repeal of the whole judiciary system, terminating the present offices and creating an entire new system, defining the common law doctrine, and restraining to the proper constitutional extent the jurisdiction of the courts."[15] A little later Jefferson admits that "the removal of excrescences from the judiciary is the universal demand."[16]

But the real movement for the repeal of the act creating the obnoxious judges came from Kentucky. In November, 1801, the legislature of that State had abolished the district courts and the general court and had established circuit courts for each county.[17] Popular interest in these courts was very keen be-

[13] Jefferson MSS., November 26, 1798.
[14] Jefferson MSS., March 23, 1801.
[15] Jefferson MSS., June 1, 1801.
[16] Jefferson MSS., August 26, 1801.
[17] *The Palladium* (Frankfort, Ky.), November 27, 1801.

cause of the powers given them in the settlement of land disputes. Upon the establishment of the United States circuit courts, the people of the State feared a conflict with the new system they had just fashioned. Numerous letters from constituents came in to John Breckinridge, who then represented Kentucky in the United States Senate, asking that some change be made in the judiciary system. One correspondent declared: "There is no act of the former Congress that in my opinion will work more subtle or certain mischief than that of extending their courts—as its tendency will be to disunite the people and wean their affections for their state governments. In Kentucky it will operate more mischievously than anywhere else by jeopardizing those principles upon which our courts have hitherto proceeded in settling their land controversies. I much hope this law will be repealed or so altered that we may feel easy under it. With the other excrescences of aristocratic legislation these additional judges may be left to graze in their own pastures."[18]

Assured of the support of the administration by the broad hint thrown out by President Jefferson in his first annual message, Breckinridge determined to lead the movement for a revision of the judicial system. At the outset he sought the advice of John Taylor of Caroline who in a long letter set forth the arguments which became the basis of the repeal of the act of 1801. When Breckinridge rose in the Senate on January 6, 1802 to propose the repeal he followed the line of reasoning outlined by Taylor so closely that in many places he made use of the identical words of the letter.

Taylor thought there were two questions involved, first whether the office established was to continue; and second whether the officer should continue after the office had been abolished as being unnecessary.

As to the first, he says: "Congress are empowered *from time to time* to ordain and establish inferior courts.

"The law for establishing the present inferior courts is a legislative instruction affirming that under this clause Congress may

[18] Breckinridge MSS., November 21, 1801.

abolish as well as create these judicial offices, because it does expressly abolish the then existing inferior courts for the purpose of making way for the present.[19]

"It is probable that this construction is correct, but it is equally pertinent to our object whether it is or not. If it is, then the present inferior courts may be abolished as constitutionally as the last; if it is not, then the law for abolishing the former courts and establishing the present was unconstitutional and is undoubtedly repealable.

"Thus the only ground which the present inferior courts can take is that Congress may from time to time create, regulate, or abolish such courts as the public interest may dictate, because such is the very tenure under which they exist."

But it would profit the Republicans little to abolish the newly established circuit courts if they were obliged at the same time to make provision for the judges who were the incumbents of those offices. In the second part of his letter Taylor explains how they may get rid of the judges as well as abolish the offices.

"The Constitution," he says, "declares that the judge shall hold his office during good behavior. Could it mean that he should hold his office after it had been abolished? Could it mean that his tenure should be limited by behaving well in an office which did not exist?

"It must either have intended these absurdities, or admit of a construction which will avoid them. This construction obviously is that the officer should hold that which he might hold, namely, an existing office, so long as he did that which he might do, namely, his duty in that office; and not that he should hold an office which did not exist, or perform duties not sanctioned by law. If, therefore, Congress can abolish the courts, as they did by the last law, the officer dies with the office, unless you allow the Constitution to admit impossibilities as well as absurdities. A construction bottomed upon either overturns the benefits of language and intellect.

"The article of the Constitution under consideration closes

[19] Two district courts were abolished by the act of 1801 but the judges were appointed to the new circuit courts.

with an idea which strongly supports my construction. The salary is to be paid 'during their continuance in office.' This limitation of salary is perfectly clear and distinct. It literally excludes the idea of paying a salary when the officer is not in office; and it is undeniably certain that he cannot be in office when there is no office. There must have been some other mode by which the officer should cease to be in office than that of bad behavior, because if this had not been the case, the Constitution would have directed 'that the judges should hold their offices *and salaries during* good behavior,' instead of directing 'that they should hold their salaries during their *continuance in office.*' This could only be an abolition of the office itself, by which the salary would cease with the office, although the judge might have conducted himself unexceptionally.

"This construction certainly coincides with the public opinion and the principles of the Constitution. By neither is the idea for a moment tolerated of maintaining burthensome sinecure offices to enrich unfruitful individuals.

"Nor is it incompatible with the 'good behavior' tenure when its origin is considered. It was invented in England to counteract the influence of the crown over the judges. And we have rushed into the principle with such precipitancy, in imitation of this our general prototype, as to have outstript monarchists in our efforts to establish a judicial oligarchy; their judges being removable by a joint vote of Lords and Commons, and ours by no similar or easy process.

"The tenure, however, is evidently bottomed on the idea of securing the honesty of judges while exercising the office, and not upon that of sustaining useless or pernicious offices for the sake of the judges. The regulation of officers in England, and indeed of inferior offices in most or all countries, depends upon the legislature; it is a part of the detail of government which necessarily devolves upon it, and is beyond the foresight of a constitution because it depends upon variable circumstances. And in England a regulation of the courts of justice was never supposed to be a violation of the 'good behavior' tenure.

"If this principle should disable Congress from erecting tribu-

nals which temporary circumstances might require, without entailing them upon society after these circumstances by ceasing had converted them into grievances, it would be used in a mode contemplated neither in its original or duplicate.

"Whether courts are created by a regard to the administration of justice, or with the purpose of rewarding a meritorious faction, the legislature may certainly abolish them without infringing the Constitution, whenever they are not required by the administration of justice, or the merit of the faction is exploded and their claim to reward disallowed."[20]

Breckinridge, in moving the repeal of the act of 1801, took the ground that the changes made in the judiciary were unnecessary and improper in that they had increased the number of federal judges at a time when the amount of business pending before the courts of the United States was steadily declining. He began by accepting the construction laid down by Taylor that the act of 1801 was "a legislative construction" of the power of Congress "from time to time, to ordain and establish inferior courts," because the two districts were abolished by the twenty-seventh section of that act. But independent of this construction, he insisted that it would be a paradox in legislation to say that the legislature in one Congress has a discretionary power to establish inferior courts and yet be restrained from abolishing them in a subsequent Congress of equal authority.

With respect to the judges he was equally certain that they must cease to be in office when the repeal of the act was accomplished. The constitutional guarantees, he thought, protected them against removal by the executive or diminution of their salaries by the legislature but never contemplated the possibility of their surviving the destruction of their offices. This would be to create a group of "nondescripts" unacknowledged by either the letter or the spirit of the Constitution.[21]

The repeal was carried and the courts were abolished and the judges legislated out of office. But this did not seem sufficient to many persons in Kentucky and the western country. In

[20] Breckinridge MSS., December 22, 1801.

[21] *Annals 7th Cong.*, 1st Sess., pp. 26–29.

truth, what was wanted by these more radical advocates of states rights was the destruction of all inferior courts of the United States and the limitation of federal jurisdiction to the scope proposed by Richard Henry Lee in the debates on the judiciary act of 1789.[22] Senator Breckinridge was urged to "go farther and make such a change in the Constitution as to limit the jurisdiction of the federal courts to courts of admiralty and cases arising under the Constitution." If this could not be done he was asked to "have it done away with in the State of Kentucky." His constituents pointed out that Kentucky was so remote from the eastern section of the country that the exercise of authority by the federal courts must interfere materially with their welfare.[23]

A judicial review of the repealing act was never had, but its constitutionality has been challenged by eminent authority.[24] Early in the debates on the repeal Breckinridge had pointed out that "if the judges are entitled to their salaries under the Constitution, our repeal will not affect them; and they will, no doubt, resort to their proper remedy."[25] Thereafter an appeal to the courts by the deposed judges had been in the minds of all. To prevent such action the next session of the supreme court was set for February, 1803, the August term being omitted in 1802. This was denounced by James A. Bayard, the leader of the Federalists in the House of Representatives, as "a patchwork designed to cover one object, the postponement of the next session of the supreme court . . . . to give the repealing act its full effect before the judges are allowed to assemble."[26]

Denied a judicial review of the act depriving them of their commissions, the judges of the circuit courts forwarded a petition to Congress in which they represented "that the rights secured to them by the Constitution, as members of the judicial depart-

[22] On June 22, 1789 Richard Henry Lee proposed to amend the Judiciary Act to provide "that the jurisdiction of the federal courts should be confined to cases of admiralty and maritime jurisdiction." Maclay: *Journal*, p. 74.

[23] Breckinridge MSS., February 22, 1802.

[24] *Story on the Constitution*, ii, p. 401.

[25] *Annals 7th Cong.*, 1st Sess., p. 30.

[26] Hamilton MSS., April 12, 1802.

ment had been impaired," and asking that the case be submitted to judicial determination. The Senate declined to consider the petition, while a proposition to submit the matter to the courts for decision was defeated in the House. Here it was held that the right to abolish inferior courts rested with Congress and that the judges were entitled to compensation only for services rendered.[27]

It is superfluous to point out that the importance of the repeal of the act of 1801 lay in the fact that the final determination of the right to abolish inferior courts and to deprive the incumbents thereof of their commissions fell to Congress. No opportunity being given the judiciary to interpret the Constitution with respect to this power, there was no means of challenging the validity of the measure in the way customary in our government. Congress was, therefore, free to claim that a precedent had been set which should determine future action in dealing with the judiciary.

The seriousness with which this precedent was urged in the course of the recent debates on the measure abolishing the United States commerce court should call attention to the unsatisfactory position of the doctrine of congressional control over the inferior courts. Chief Justice Marshall in private commented upon the repealing act of 1802 considering it to be "operative in depriving the judges of all power derived under the act repealed. But the office remains which is a mere capacity, without a new appointment, to receive and exercise any new judicial powers which the legislature may confer."[28]

In practice this is the view Congress has followed in every alteration made in the judiciary subsequent to 1802. Nevertheless the validity of the early precedent has been asserted in both houses of Congress and, according to many statesmen, has never been abandoned. That it may again be brought forward to justify an encroachment upon the judiciary portends a real danger to this department of government.

[27] *Annals 7th Cong.*, 2nd Sess., pp. 427–441.
[28] Hamilton MSS., April 25, 1802.